



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Part 819

RIN 2900-AM92

Department of Veterans Affairs Acquisition Regulation: Service-Disabled
Veteran-Owned and Veteran-Owned Small Business Status Protests

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, without change, the interim final rule published in the Federal Register on September 30, 2013. This document implements a portion of the Veterans Benefits, Health Care, and Information Technology Act of 2006, which requires the Department of Veterans Affairs (VA) to verify ownership and control of Veteran-owned small businesses (VOSBs), including service-disabled Veteran-owned small businesses (SDVOSBs), in order for these firms to participate in VA acquisitions set asides for SDVOSB/VOSBs. Specifically, VA amends its adjudication procedures for SDVOSB and VOSB status protests, to provide that VA's Director, Center for Verification and Evaluation (CVE), shall initially adjudicate SDVOSB and VOSB status protests, and to provide that protested businesses, if they are denied status, may appeal to VA's Executive Director, Office of Small and Disadvantaged Business Utilization (OSDBU). SDVOSB/VOSB status protests

occur when during a particular SDVOSB/VOSB set aside acquisition, a competing vendor in acquisition challenges the status of the putative awardee as an actual SDVOSB or VOSB, as applicable. Additionally, VA amends the title of CVE from the Center for Veterans Enterprise to the Center for Verification and Evaluation, to more appropriately represent the function of this office.

DATES: Effective Date: This final rule is effective [insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Cheryl Duckett-Moody, Senior Procurement Analysis (003A2A), Department of Veterans Affairs, 425 I ST, NW., Washington, DC 20001, (202) 632-5319. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: On September 30, 2013, VA published in the Federal Register (78 FR 59861) an interim final rule that revised the interim adjudication procedures for SDVOSB and VOSB status protests to provide that VA's Director of CVE shall initially adjudicate SDVOSB and VOSB status protests and to provide that either the protesting party or the protested business may appeal the Director of CVE's decision to the Executive Director of OSDBU. In addition, the interim final rule described procedures used by both VA's Director of CVE and the Executive Director of OSDBU to use in status protest and appeals of status protests. As noted in the preamble to the interim final rule, VA has concluded that it will not utilize the U.S. Small Business Administration (SBA) to

consider and decide VA SDVOSB and VOSB status protests on behalf of VA because this program is founded in Title 38 of the U.S. Code, solely applicable to VA acquisitions, and VA has developed appropriate internal expertise in adjudicating SDVOSB/VOSB status protests.

We provided a 60-day comment period that ended on November 29, 2013. We received one comment. The commenter discussed the SBA's view expressed in the Government Accountability Office (GAO) bid protest case Latvian Connection LLC, (GAO Case Number B-408633) that under 15 U.S.C. 644(j)(1) and 13 CFR 125.2(f)(1) there is an automatic small business set-aside requirement imposed even where the competition takes place outside of the United States. This comment addressed an issue that is beyond the scope of the request for comments. Therefore, we make no changes based on this comment. Based on the rationale set forth in the interim final rule, we adopt the interim final rule as a final rule without change.

Administrative Procedure Act

This document affirms the amendments in the interim final rule that is already in effect. In accordance with 5 U.S.C. 553(b)(B) and (d)(3), the Secretary of VA concluded that there was good cause to dispense with advance public notice and the opportunity to comment on this rule, and also good cause to publish this rule with an immediate effective date. VA provided that the Executive Director, OSD BU, shall consider and decide SDVOSB and VOSB

status protests until VA and SBA executed an interagency agreement for SBA to consider and decide SDVOSB and VOSB status protests. For the reasons stated in 78 FR 59861, that VA has developed the necessary expertise to administer a SDVOSB/VOSB set aside program, including associated status protests, enacted in statute solely applicable to VA, we have determined that adjudication of SDVOSB and VOSB status protests shall remain within VA. Therefore, we are adopting as final the interim provision to provide that the Director, CVE, shall initially adjudicate SDVOSB and VOSB status protests and to provide that either the protester or the protested business may appeal the Director, CVE, decision to the Executive Director, OSDDBU. Thus, the final rule continues to authorize an administrative appeal at the agency level, where the lack thereof had been criticized in Miles Construction, LLC v. United States, 108 Fed. Cl. 792 (2013), as not providing a party adequate due process and the opportunity to be heard at a meaningful time in a meaningful manner.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The final arbiter of VA SDVOSB and VOSB status protests remains the Executive Director, OSDDBU, as previously promulgated. The main change is that the Secretary has determined that SBA should not be involved in VA SDVOSB or VOSB status protests because these status protests are solely associated with title 38 SDVOSB and

VOSB set-aside acquisitions where SDVOSB or VOSB status is to be determined by the Secretary pursuant to 38 U.S.C. 8127(f). On this basis, the Secretary certifies that the adoption of this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995, at 2 U.S.C. 1532, requires that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule contains no collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including

potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA’s Web site

at <http://www.va.gov/orpm/>, by following the link for VA Regulations Published from FY 2004 to FYTD.

Catalog of Federal Domestic Assistance

There is no Catalog of Federal Domestic Assistance number or title for this program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on March 2, 2015, for publication.

List of Subjects in 48 CFR Part 819

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small businesses, Veterans.

Dated: March 5, 2015

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Accordingly, VA adopts the interim final rule amending 48 CFR part 819, which was published in the Federal Register at 78 FR 59861 on September 30, 2013, as a final rule without change.

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